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6 **C.W., ET AL.,**

Plaintiffs,

7
8 vs.

9 **EPIC GAMES, INC.,**

10 Defendant.

CASE NO. 19-cv-03629-YGR

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20 **ORDER GRANTING IN PART AND DENYING
IN PART MOTION TO DISMISS**

Re: Dkt. No. 59

This is the second round of briefing on the complaint filed by plaintiff C.W., a minor, by and through his guardian, plaintiff Rebecca White. In its prior order, this Court denied defendant Epic Games, Inc.'s motion to dismiss plaintiffs' claims for (i) declaratory judgment and (ii) violation of California's Unfair Competition Law ("UCL"), California Business and Professions Code §§ 17200, *et seq.*, insofar as the UCL claim was brought under the "unlawful" prong and predicated on an alleged violation of C.W.'s right to disaffirm. The Court also granted the motion with leave to amend as to plaintiffs' claims for (i) violation of the California Consumers Legal Remedies Act ("CLRA"), California Civil Code §§ 1750, *et seq.*; (ii) violation of the implied covenant of good faith and fair dealing; (iii) negligent misrepresentation; (iv) violation of the UCL, except as set forth above; and (v) unjust enrichment.

Now before the Court is defendant's motion to dismiss the first amended complaint ("FAC"). Having carefully considered the pleadings and papers submitted, and for the reasons set forth below, the Court **GRANTS IN PART AND DENIES IN PART** defendant's motion.

1. **Declaratory Judgment & UCL "Unlawful" Prong (Counts I and V)**

In its prior order, the Court rejected Epic Games' request for dismissal of plaintiffs' claims for declaratory judgment on the grounds that there is an actual controversy between the parties over the rights of minors to disaffirm in-App purchases and, if the contracts can be disaffirmed, whether minors are entitled to refunds. The Court also denied dismissal as to plaintiffs' claim for

1 violation of the UCL “unlawful” prong to the extent it is predicated on defendant’s alleged
2 violation of the minor’s right to disaffirm a contract. Epic Games now argues that plaintiffs’ new
3 allegations give rise to additional grounds for dismissal of these claims. The Court disagrees.

4 First, defendant contends that plaintiffs cannot invoke disaffirmance rights against
5 defendant for purchases made using Apple Inc. and Sony Interactive Entertainment Corp. gift
6 cards, which were redeemed on the iTunes and PlayStation marketplaces, respectively. In so
7 arguing, defendant claims there is no factual support in the FAC for plaintiffs’ characterization of
8 Apple and Sony as “payment vendors” that “merely facilitate transactions on behalf of” defendant.
9 Federal pleading standards do not require more specific factual support. Further, in another action
10 currently pending before this Court, defendant itself refers to Apple’s marketplace as a “payment
11 processing platform” for selling “digital in-app content to [] consumers,” from which defendant
12 collects 70 percent of the consumer’s payment. *Epic Games, Inc. v. Apple Inc.*, No. 4:20-cv-5640,
13 Dkt. 1, ¶¶ 3, 10 (N.D. Cal. August 13, 2020) (“*Epic Games v. Apple*”).¹ In addition, plaintiffs
14 assert that C.W. purchased in-App content pursuant to defendant’s End User License Agreement.
15 Defendant’s suggestion that it has nothing to do with the transactions at issue is unavailing, at least
16 at this juncture.²

17 Nor is the Court persuaded that plaintiffs legally are precluded from invoking
18 disaffirmance as to transactions made by C.W. using his mother’s credit card. The FAC alleges
19 that C.W. “made V-Bucks purchases through his parents’ credit cards and debit cards that were
20 available from his gaming platforms.” Plaintiffs do not allege how C.W.’s parents’ “financial
21 information” became “available” for use on C.W.’s devices, but the FAC elsewhere alleges that

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23 ¹ The Court sua sponte takes judicial notice of the complaint in *Epic Games v. Apple* as a
24 matter of public record. *See Contest Promotions, LLC v. City & Cty. of San Francisco*, No. 16-
25 CV-06539-SI, 2017 WL 76896, at *1 (N.D. Cal. Jan. 9, 2017) (granting request to take judicial
notice of various documents, including federal court dockets and filings; explaining that a “court
can take notice of proceedings in other courts, both within and without the federal judicial system,
if those proceedings have a direct relation to matters at issue”).

26 ² Defendant also argues that plaintiffs cannot disaffirm transactions made using gift cards
27 that C.W. received from others because he was not using his “own money.” This argument fails to
28 persuade. Regardless of who initially paid for the gift cards, they allegedly were given to C.W. as
gifts on social occasions. California law suggests that the holder of a gift card is the owner of the
money received and has rights of redeeming the same. *See* Cal. Civ. Code § 1749.5(b).

1 “[i]n many instances, parents ignore these expenses as onesie-twosie expenses at the early stages
2 of using Fortnite.” From these allegations, and plaintiffs’ assertion that no credit card information
3 was stolen, defendant infers that C.W.’s mother entered her credit card number into C.W.’s
4 *Fortnite* account, failed to monitor his usage, and ratified the purchases by paying her credit card
5 bills. At this stage, the Court cannot dismiss plaintiffs’ claims based on Epic Games’ preferred
6 inference. The FAC alleges that C.W.’s parents “did not consent to use of [their financial]
7 information” and “did not know of the amounts spent at the time of purchase.” Defendant does
8 not cite any controlling authority limiting a minor’s right to disaffirm contracts under such
9 circumstances.³ Plaintiffs’ allegations, taken as true, suffice to state a claim based on
10 disaffirmance.

11 *I.B. ex rel. Fife v. Facebook, Inc.*, 905 F. Supp. 2d 989 (N.D. Cal. 2012) is in accord.
12 There, a minor plaintiff obtained permission from his mother to use her credit card to make a \$20
13 purchase on his Facebook account. *Id.* at 996. Subsequently, without any notice that Facebook
14 stored his mother’s credit card information, the minor made additional purchases. *Id.* Facebook
15 argued that the minor could not disaffirm purchases to recover consideration paid by his parents.
16 *Id.* at 1003. The court disagreed, and denied Facebook’s motion to dismiss on this ground, in
17 large part because the plaintiffs allegedly “used their parents’ funds to purchase Facebook Credits
18 without the parents’ knowledge or authorization.” *Id.* at 1004.

19 Finally, defendant does not present any change of law that would cause this Court to
20 reconsider the remaining issues related to disaffirmance on which it already ruled, including
21 whether C.W. can disaffirm purchases from which he already has benefitted, whether plaintiffs
22 have stated what they wish to disaffirm, and whether plaintiffs were required to give defendant a
23 pre-suit opportunity to consider a request for disaffirmance or a refund. The Court’s prior rulings
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26 ³ In Restatement (Third) of Agency § 3.05, cmt. B, illus. 1 (2006), unlike here, the parent
27 gives the child consent to use the parent’s computer to order goods from an online retailer who
28 already has the parent’s credit card information. Further, *Grube v. Amazon.com, Inc.*, No. 16-cv-
126-LM, 2017 WL 3917602 (D.N.H. Sept. 6, 2017) is an out-of-circuit, unpublished decision that
did not involve a claim of disaffirmance.

1 as to these issues stand.⁴

2 Defendant's motion to dismiss plaintiffs' claims for a declaratory judgment and violation
3 of the UCL's "unlawful" prong is **DENIED**.

4 **2. Breach of Good Faith and Fair Dealing (Count III)**

5 In its prior order, the Court found plaintiffs had not stated a good faith and fair dealing
6 claim based on allegations that defendant failed to ensure minors obtained their guardian's consent
7 before playing *Fortnite* and induced minors to make non-refundable in-App purchases. The FAC
8 does not cure the defects.

9 Plaintiffs supplement their allegations with a new theory that by frequently releasing new
10 content without proper notice to players, rendering already-purchased content stale within a short
11 period of time, the covenant is breached. Even construing these allegations in the manner most
12 favorable to plaintiffs, the Court finds this theory too strained to support a claim. There is nothing
13 inherently inconsistent with defendant marketing its in-App content as "in keeping with the
14 current fad" and a "great value proposition," while introducing new and updated content on a
15 weekly or bi-weekly basis. Moreover, the crux of plaintiffs' claims is that minors were induced to
16 make frequent one-click purchases. Yet it is likely that after a few instances of defendant
17 releasing new content in a short period of time, even a minor would be on notice of—and perhaps
18 come to expect—this feature of *Fortnite*. The Court is not persuaded that defendant's conduct
19 with respect to introducing in-App content is actionable as a breach of good faith and fair dealing.

20 The FAC also reiterates plaintiffs' claim that defendant breached the implied covenant by
21 displaying its non-refundability terms inconspicuously and, separately, by promoting non-
22 refundability, thereby making minors believe they could not recover amounts spent on digital

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24 ⁴ In its prior order, the Court noted that to the extent there was a choice-of-law dispute,
25 both California and North Carolina law recognize a minor's right to disaffirm, and the
26 disaffirmance analysis would not necessarily vary based on which law was applied. Defendant's
27 motion again raises the issue, arguing that North Carolina law applies, and thereunder, a minor can
28 disaffirm a contract only if he "restores whatever part he still has of the benefit he received under
the contract." *Gillis v. Whitley's Discount Auto Sales, Inc.*, 319 S.E.2d 661, 667 (N.C. App. 1984)
(citation omitted). This argument fails to persuade. Even if North Carolina law applied, defendant
does not identify any case authority suggesting disaffirmation is not possible in the case of digital
content that can be restored by the software developer.

1 content as provided under law. None of these allegations change the Court’s prior determination
2 that there is no *contractual* basis for plaintiffs’ good faith and fair dealing claim. Thus, as was the
3 case with the initial complaint, there was no breach of an implied duty under the parties’ contract.

4 Plaintiffs’ expanded allegations regarding defendant’s failure to provide receipts or
5 historical statements for in-App purchases fails for the same reason. Although a “breach of a
6 specific provision of the contract is not a necessary prerequisite” to plaintiffs’ claim, *Carma*
7 *Developers, Inc. v. Marathon Development California, Inc.*, 2 Cal.4th 342, 373 (1992), an implied
8 covenant “cannot impose substantive duties or limits on the contracting parties beyond
9 those incorporated in the specific terms of their agreement,” *Appling v. State Farm Mut. Auto. Ins.*
10 *Co.*, 340 F.3d 769, 779 (9th Cir. 2003) (quotation omitted). Here, plaintiffs do not tie the absence
11 of receipts or historical statements to the language or the spirit of the parties’ contract.

12 Finally, plaintiffs contend that they have asserted a “tortious bad-faith” claim separate
13 from their “contractual bad-faith claim.” “Generally, no cause of action for the tortious breach of
14 the implied covenant of good faith and fair dealing can arise unless the parties are in a ‘special
15 relationship’ with ‘fiduciary characteristics.’” *Pension Tr. Fund v. Fed. Ins. Co.*, 307 F.3d 944,
16 955 (9th Cir. 2002) (quoting *Mitsui Mfrs. Bank v. Superior Court*, 212 Cal.App.3d 726, 730
17 (1989)). There are no allegations suggesting a “special” or “fiduciary” relationship here, and thus,
18 this theory, too, fails. Accordingly, the claim for breach of the covenant of good faith and fair
19 dealing claim is **DISMISSED**. Further, as plaintiffs already have had an opportunity to amend the
20 pleadings to state a plausible claim, and failed to do so, the claim is dismissed **WITH PREJUDICE**.

21 **3. Negligent Misrepresentation (Count IV)**

22 The FAC also includes new allegations that purportedly support plaintiffs’ negligent
23 misrepresentation claim. To a large extent, these allegations of material misrepresentations and
24 omissions are the same as those set forth with respect to the good faith and fair dealing claim
25 discussed above. However, tortious conduct is distinctly different from that arising out of
26 contract.

27 Three of plaintiffs’ theories, rejected under a contractual rubric, are also rejected here. For
28 the reasons set forth above, the Court finds that the FAC does not state a misrepresentation claim

1 with respect to the theory regarding (i) the frequently introduction of new content, rendering older
2 content stale; (ii) the alleged failure to provide receipts or purchase history; and (iii) the practice of
3 marketing items as “non-refundable” without an explicit disclaimer that minors have rights under
4 state law to disaffirm contracts.

5 By contrast, plaintiffs also plead another theory of misrepresentation, namely, that C.W.
6 relied on defendant’s misrepresentations and omissions regarding the refundability of certain
7 content, including Battle Pass. This theory was floated briefly in the initial complaint. In
8 rejecting the claim, the Court noted that there were inconsistencies in plaintiffs’ allegations that,
9 on the one hand, defendant did not notify plaintiffs of its non-refundability policy, and, on the
10 other hand, defendant allowed refunds on certain items, and according to at least one screenshot
11 included in the complaint, identified which items were not eligible for refunds. The initial
12 complaint also failed to include any factual allegations that C.W. relied on misrepresentations.

13 In the FAC, plaintiffs expand upon and clarify their earlier allegations, claiming that
14 defendant “conceal[s] the terms of the in-App purchase at the time of purchase by not displaying
15 non-refundability or by displaying non-refundability in very small font.” Plaintiffs aver that
16 minors “are not buyers who would look for refund policy options at the time of purchase,” and
17 thus, by not including “visibly cautionary language at the time of promoting in-App purchases,”
18 defendant’s conduct is misleading. Specific to C.W., the FAC alleges that prior to making in-App
19 purchases, he “was not aware of the non-refundable policy for Battle Pass, the non-refundability of
20 purchases older than 30 days and the non-refundability of any items after exhausting three refunds
21 for a given lifetime.”⁵ With respect to reliance, the FAC alleges that C.W. “relied on Epic’s
22 misrepresentation regarding non-refundability for Battle Pass purchases and non-refundability of
23 purchases . . . older than 30 days.” In sum, instead of simply stating that no notice was given,
24 which was contradicted by one of the screenshots in the initial complaint, plaintiffs now allege
25 in greater detail that the manner in which defendant made or failed to make representations about
26 refundability was confusing, inconspicuous, inadequate, and designed to induce frequent in-App

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28 ⁵ In addition, plaintiffs no longer allege that C.W. made purchases “that were labeled non-
refundable.”

1 purchases, which it did by virtue of C.W.’s age, the nature of the *Fortnite* ecosystem, and the lack
2 of parental controls. Taking plaintiffs’ allegations as true, they suffice to state a claim that
3 defendant made material misrepresentations or omissions on which C.W. justifiably relied to his
4 own detriment.

5 As such, defendant’s motion to dismiss the negligent misrepresentation claim is **DENIED** as
6 to this last theory and **GRANTED** as to the others.

7 **4. CLRA (Count II)**

8 The Court previously dismissed plaintiffs’ CLRA claim on the grounds that the virtual
9 currency C.W. allegedly purchased while playing *Fortnite* is not a “good” under the CLRA and
10 plaintiffs had not alleged that C.W. was misled.

11 Plaintiffs have amended their complaint to allege that C.W.’s in-App purchases for virtual
12 currency and content were licenses for entertainment use, which qualify as “services” under the
13 CLRA. The CLRA defines “services” as “work, labor, and services for other than a commercial
14 or business use.” Cal. Civ. Code § 1761(b). Plaintiffs cite *Anderson v. SeaWorld Parks and*
15 *Entertainment*, 2016 WL 8929295 at *10 (N.D. Cal. Nov. 7, 2016) for the proposition that the
16 statute encompasses “educational and entertainment services.” *Anderson* is a non-citable case,
17 however, and in any event, it is not squarely on point as it involved the purchase of tickets for
18 admission to a theme park. In cases involving software, courts frequently find that the CLRA
19 does not apply. *See, e.g., Rojas-Lozano v. Google, Inc.*, 159 F. Supp. 3d 1101, 1116 (N.D. Cal.
20 2016) (transcription program that was “only available online and [] [did] not provide users with
21 any kind of ongoing service” was not a “service” under the CLRA); *Ferrington v. McAfee, Inc.*,
22 No. 10-CV-01455-LHK, 2010 WL 3910169, at *18-19 (N.D. Cal. Oct. 5, 2010) (software is not
23 a good or service under the CLRA); *In re iPhone Application Litig.*, 844 F.Supp.2d 1040, 1070
24 (N.D. Cal. 2012) (“[T]o the extent Plaintiffs’ allegations are based solely on software, Plaintiffs do
25 not have a claim under the CLRA.”).

26 While traditional software products are not considered goods under the CLRA, it is not
27 clear whether *Fortnite* technologically crosses over. In *Epic Games v. Apple*, Epic Games
28 describes *Fortnite* as “a colorful virtual world where [millions of people] meet, play, talk,

1 compete, dance, and even attend concerts and other cultural events.” No. 4:20-cv-5640, Dkt. 1,
2 ¶ 24. The Court finds that it is plausible that this may be a cross-over product, and absent a full
3 record, the CLRA claim is not subject to dismissal on this basis.⁶

4 Having so found, the Court must consider whether plaintiffs have amended their complaint
5 to plead a misrepresentation or omission that is actionable under the CLRA.

6 In paragraphs 94 through 98 of the FAC, plaintiffs put forth the same theories of
7 representation discussed and rejected above, namely, that defendant failed to represent that all
8 purchases were refundable under state law, frequently pushed new content rendering older content
9 stale, and failed to provide historical statements. For the same reasons the Court found those
10 theories not actionable with respect to the good faith and fair dealing and negligent
11 misrepresentation claims, those theories are not actionable under the CLRA.

12 Paragraph 98 of the FAC also references the one theory the Court has allowed to go
13 forward in support of the negligent misrepresentation claim: that defendant misled C.W. regarding
14 non-refundability terms. Specifically, plaintiffs allege that “Epic owes a duty of care to disclose
15 material facts, including non-refundable terms[.]” Thus, as to non-refundability, plaintiffs attempt
16 to plead an omission-based theory of liability under the CLRA.

17 The Ninth Circuit has held that to be actionable under the CLRA, an omission “must be
18 contrary to a representation actually made by the defendant, or an omission of a fact the defendant
19 was obliged to disclose” *Hodson v. Mars, Inc.*, 891 F.3d 857, 865 (9th Cir. 2018) (citing
20 *Daugherty v. Am. Honda Motor Co.*, 144 Cal.App.4th 824 (2006)). As to the first option, the only
21 actual, specific representation identified in the FAC is defendant’s labeling of certain content as
22 non-refundable. However, plaintiffs’ theory of the case is that such representations were unclear

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25 ⁶ The Court GRANTS plaintiffs’ request for judicial notice of U.S. Trademark Registration
26 No. 5,375,076 for FORTNITE, which is a matter of public record not subject to reasonable
27 dispute. See *Harris v. Cty. of Orange*, 682 F.3d 1126, 1131-32 (9th Cir. 2012) (quoting in part
28 Fed. R. Evid. 201) (noting that courts may take judicial notice of documents or information that
“can be accurately and readily determined from sources whose accuracy cannot be questioned,”
including “undisputed matters of public record”). Therein, defendant classifies *Fortnite* as an
“[e]ntertainment service[]” for purposes of registering its trademark. Such a designation, while
not binding, further demonstrates the need to resolve the issue on a full record.

1 or inconspicuous, and consequently, C.W. was not aware of them. Thus, the FAC fails to point to
2 any affirmative representation that was contrary to an omission. As to the second option, the
3 Ninth Circuit has recognized a duty to disclose defects that relate to the “central functionality” of a
4 product. *Hodsdon*, 891 F.3d at 863. Even construing the allegations in the manner most favorable
5 to plaintiffs, the Court is not persuaded that plaintiffs have pleaded facts to show that refundability
6 terms are central to *Fortnite*’s function as a “socially connected video game on the internet.”
7 Indeed, the FAC alleges that defendant allows for free downloads of *Fortnite*, and thus, even if it
8 tries to lure minors into spending large sums within the game, at least some *Fortnite* players are
9 not concerned with the refundability terms at all. As such, there was no omission of material fact
10 that defendant was obliged to disclose. *See id.* at 864 (the existence of child or slave labor in
11 supply chain did not affect chocolate’s central function); *Browning v. Unilever United States, Inc.*,
12 No. SACV1602210AGKESX, 2018 WL 6615064, at *3 (C.D. Cal. Dec. 17, 2018) (fact that facial
13 exfoliant might cause “micro-tears” on skin did not go to product’s central functional).

14 Accordingly, the motion with respect to CLRA claim is **GRANTED WITH PREJUDICE**.

15 **5. UCL “Unfair” and “Fraudulent” Prongs (Count V)**

16 The Court previously dismissed with leave to amend plaintiffs’ claims under the “unfair”
17 and “fraudulent” prongs of the UCL. Plaintiffs amend these claims in the FAC to incorporate their
18 new allegations regarding defendant misleading and misinforming minors, thereby inducing them
19 to make frequent in-App purchases.

20 In general, conduct is “unfair” against consumers when a practice “offends an established
21 public policy”; “is immoral, unethical, oppressive, unscrupulous or substantially injurious to
22 consumers”; is “tethered to some legislatively declared policy”; or is “proof of some actual or
23 threatened impact on competition.” *Hodsdon*, 891 F.3d at 866. Here, given the Court’s holding
24 on the negligent misrepresentation claim, and in particular, plaintiffs’ amended allegations
25 regarding the manner in which defendant allegedly lures minors to spend large amounts of money
26 on in-App purchases without parental consent, the Court finds plaintiffs state a plausible claim that
27 defendant’s conduct is immoral, unethical, oppressive, unscrupulous, or substantially injurious to
28 consumers.

1 The “fraudulent” prong of the UCL generally “requires a showing [that] members of the
2 public are likely to be deceived,” *Wang v. Massey Chevrolet*, 97 Cal. App. 4th 856, 871 (2002), as
3 well as proof of “actual reliance,” *Sateriale v. R.J. Reynolds Tobacco Co.*, 697 F.3d 777, 793 (9th
4 Cir. 2012) (citation omitted). For the same reasons discussed with respect to the negligent
5 misrepresentation claim, the Court finds that plaintiffs have stated a plausible UCL claim based on
6 allegedly material misrepresentations or omissions regarding refundability.

7 Accordingly, defendant's motion to dismiss plaintiffs' claim under the UCL's "unfair" and
8 "fraudulent" prongs is **DENIED**.

9 || 6. Unjust Enrichment (Count VI)

In its prior order, the Court held that plaintiffs' unjust enrichment claim failed because they had not alleged that C.W. was misled or that defendant breached any express or implied covenant as it related to defendant's non-refundability policy. Although plaintiffs have amended their pleadings as to defendant's alleged misrepresentations or omissions, unjust enrichment ultimately is a quasi-contract claim. *See Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th Cir. 2015). Because the Court finds, as set forth above, that plaintiffs have not pleaded sufficiently a claim based in contract, defendant's motion to dismiss the unjust enrichment claim again is

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19 For the foregoing reasons, defendant's motion to dismiss is **GRANTED WITH PREJUDICE**
20 as to the good faith and fair dealing, CLRA, and unjust enrichment claims. The motion is **DENIED**
21 as to all other claims. Defendant shall respond to the amended complaint within **twenty-one (21)**
22 **days** of this order. Further, a case management conference shall be set for **Monday, October 5,**
23 **2020 at 2:00 p.m.** A link to the Zoom platform will be posted in advance of the conference.

24 This Order terminates Docket Number 59.

25 | IT IS SO ORDERED.

26 Dated: September 3, 2020

Yvonne Gonzalez Rogers
YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE